

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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INNOVATION VENTURES, LLC; LIVING :
ESSENTIALS, LLC; and INTERNATIONAL IP :
HOLDINGS, LLC, :
Plaintiffs, : 12 Civ. 5354 (KAM) (RLM)
-against- : [PROPOSED] CONSENT ORDER
ULTIMATE ONE DISTRIBUTING CORP., et :
al., :
Defendants. :
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On consent of Plaintiffs Innovation Ventures, LLC, Living Essentials, LLC, and International IP Holdings, LLC (together, "Living Essentials") and Defendant Brothers Trading Co., Inc., d/b/a Victory Wholesale Grocers ("Victory"), it is hereby ORDERED, ADJUDGED and DECREED:

I. For purposes of this Order, the "5-hour ENERGY® Marks" are:

- "5 HOUR ENERGY" (Registration No. 3,003,077);
- "5-HOUR ENERGY" (Registration No. 4,004,225);

- 5-hour**
ENERGY (Registration No. 4,104,670);
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- which includes the wording "5-hour ENERGY" in black outlined in yellow, below which are the words "EXTRA STRENGTH" in yellow, along with a person in black silhouette, outlined in yellow, shown in an athletic pose adjacent to an uneven landscape, with the sky depicted in transitioning colors from black to red as the sky meets the landscape (Registration No. 4,116,951);

- [Image of a black silhouette of a person running], commonly referred to as "Running Man," (Registration No. 3,698,044); and
 - [Image of a 5-hour ENERGY drink bottle] which includes the wording "5-hour ENERGY" in black outlined in yellow, along with a person in black silhouette, outlined in yellow, shown in an athletic pose adjacent to an uneven landscape, with the sky depicted in transitioning colors from red to yellow as the sky meets the landscape (Registration No. 4,120,360).
2. For purposes of this Order, the "5-hour ENERGY® Trade Dress" is the distinctive packaging used to distinguish 5-hour ENERGY® products in the marketplace and which consumers associate strongly with the products. The packaging is shown as follows:



3. Victory, its servants, employees, affiliates, subsidiaries shall not:
 - a. knowingly use any of the 5-hour ENERGY® Marks (or any marks confusingly similar thereto) on any counterfeit product in connection with the manufacture, sale, offer for sale, distribution, advertisement, or any other use of dietary supplements;
 - b. knowingly use any logo, trade name, or trademark confusingly similar to any of the 5-hour ENERGY® Marks which may be calculated to falsely represent or which has the effect of falsely representing that the services or products of Victory or of others are sponsored by, authorized by, or in any way associated with Living Essentials;
 - c. knowingly infringe any of the 5-hour ENERGY® Marks, or the 5-hour ENERGY® Trade Dress;
 - d. falsely represent themselves as being connected with Living Essentials or sponsored by or associated with Living Essentials, or engaging in any act which is likely to cause the trade, retailers, or members of the purchasing public to believe that they are associated with Living Essentials, provided, however, that the purchase and sale of 5-hour ENERGY® products shall not be a violation of this sub-paragraph.

4. If Victory, its servants, employees, affiliates, or subsidiaries choose to purchase any products with the 5-hour ENERGY® Marks, Victory shall obtain a copy of an invoice or bill of lading that shows the products originated from Living Essentials. Such

invoice or bill of lading may contain redacted purchase and pricing information.

5. Victory shall retain any records documenting the sale, distribution, receipt, or pedigree of any product bearing any of the 5-hour ENERGY® Marks for a period of at least one year.

6. Nothing contained in this Consent Order is or shall be construed as an admission, express or implied, of any improper or illegal conduct, or of any culpability or liability on the part of Victory. Further, it is expressly understood and acknowledged that Victory maintains that it did not know and had no reason to know that any of the Living Essentials products that it purchased and thereafter sold were other than genuine, and Victory maintains that it made reasonable efforts to ensure that the Living Essentials products it purchased and resold were genuine.

7. Any claims that Victory may have against any other individual or entity arising out of their purchase, distribution, advertising, offering for sale, and sale in commerce of products containing the 5-hour ENERGY® Marks are hereby assigned to Living Essentials.

8. In addition to other remedies, including damages, for contempt of this Consent Order, in the event of breach or violation of the terms of this Order by Victory, its servants, employees, affiliates, or subsidiaries, Living Essentials is entitled to a preliminary and permanent injunction against the breaching conduct solely upon a showing of a likelihood of success of establishing that such a breach occurred. Living Essentials and Victory agree that jurisdiction and venue for such an action exist in this District Court, and Victory waives any and all defenses based on personal jurisdiction and venue.

9. This Consent Judgment is entered pursuant to Rule 58 of the Federal Rules of

Civil Procedure, and this action is hereby dismissed with prejudice against only Victory, without costs or attorneys' fees, save that this District Court shall retain jurisdiction over this action, including over implementation of, or disputes arising out of, this Consent Judgment or the settlement of this action with regard to Victory.

10. Signatures transmitted electronically or by facsimile shall be deemed original.

Dated: August 19, 2013

INNOVATION VENTURES, LLC,
LIVING ESSENTIALS, LLC, and
INTERNATIONAL IP HOLDINGS, LLC

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IT IS SO ORDERED

HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE